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# FUNCTIONS AND AIMS OF HARMONISATION AFTER THE LISBON TREATY. A EUROPEAN PERSPECTIVE

*Matthias Borgers*

## 1. Introduction

This paper centres on the question of what the functions and aims of harmonisation will be after the entry into effect of the Lisbon Treaty, which is as yet uncertain. The answer to that question is indicative of the level that European harmonisation of criminal law has now reached. Criminal law is still viewed as an area in which national sovereignty and identity are important themes. The harmonisation of criminal law is still at odds with this. At the same time, nobody denies that a purely national approach to criminal law is outmoded and that there are good reasons to enter into and continue close cooperation in criminal law at European level, for example through the approximation of legislation. This entails maintaining the right midpoint: in what areas and to what extent is European unification required for good cooperation and at what levels can Member States give their own substance to criminal law? The position of that right midpoint is not a statistical fact, but particularly the result of an endless political and legal debate. The Lisbon Treaty can be considered as the current state of that debate. Where is the right midpoint when it comes to the willingness and possibilities to harmonise the criminal law of the Member States? For the record: this concerns the (descriptive) question, and not a (normative) assessment, of what the Member States consider the right midpoint.<sup>1</sup>

Before discussing this central question, I need to make two comments. In the first place, as everyone undoubtedly knows, harmonisation is not the same as

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1 Bookshelves have meanwhile been filled with writings about the desirability of harmonisation of criminal law in the European Union. This article is not intended to repeat that debate. See, among many, P. Asp, 'Harmonisation and Cooperation within the Third Pillar. Built-in Risks', *Cambridge Yearbook of European Legal Studies* (1999), pp. 15-23.

unification. When harmonisation is referred to, it does not mean the complete replacement of national criminal law systems by a single, uniform European criminal law, but the approximation of aspects of the different criminal law systems. In many but not all cases, this will involve *minimum* harmonisation, whereby the Member States will retain the freedom to take measures going beyond the minimum set rules.<sup>2</sup> Secondly, when I refer to harmonisation, I have in mind the harmonisation of substantive and procedural criminal law. This is not about the harmonisation of cooperation procedures as a side effect of the introduction of forms of application of the principle of mutual recognition.

## 2. Functions of Harmonisation

Before the Lisbon Treaty is discussed, it is helpful to say something about the functions that can be distinguished in relation to the harmonisation of criminal law. Roughly speaking, two functions of harmonisation can be distinguished.<sup>3</sup>

First of all, there is the so-called autonomous function, in which the mutual harmonisation of the criminal law of the Member States is an *autonomous* means to create an area of freedom, security and justice. The existence of a common area of law presumes that the differences in the level of legal protection are not too great. Harmonisation helps to bring about equal legal protection within the Union, against both crime and government actions. The harmonisation of substantive criminal law helps to fight crime because criminals cannot benefit from differences in penalisation. *Safe havens* are prevented.<sup>4</sup> Harmonisation of the law of criminal procedure should not only guarantee that effective action can be taken on a common basis throughout the Union, but also that the citizens of the Union receive equal legal protection throughout the Union.

Besides this autonomous function, harmonisation also has a *support* (or auxiliary) function. The main idea of this is that effective cooperation between the Member States in criminal matters would be facilitated if the differences

existing between the criminal law systems of the Member States were not too great.<sup>5</sup> A certain degree of equality is important, first of all for the existence or creation of mutual trust among the Member States. It is easier to trust other Member States if one knows that the approach to criminal matters is not based on a fundamentally different model. Mutual trust is in turn a basis for cooperation based on the principle of mutual recognition. Harmonisation also helps to ensure that the competences of institutions such as Europol and Eurojust can be clearly defined.

The autonomous and support functions are, of course, in line with each other. It is nevertheless advisable to make a distinction, because a certain difference appears to exist in the degree of harmonisation. The autonomous function of harmonisation assumes a relatively far-reaching degree of approximation of the Member States' criminal law systems. This affects the intensity – the differences may not be too great and thus rather detailed rules are required – and it affects the scope – a wide range of criminal offences and rules of criminal procedure are the subject of harmonisation. Regarding the support function of harmonisation, one can rather limit oneself to the differences which actually prove to be obstacles to effective cooperation.

By examining how much weight is attributed to each of the two functions, one can also say something about the degree of harmonisation apparently considered to be desirable.

## 3. The Position of Harmonisation in the Development of European Criminal Law

### 3.1. EU Treaty

What is the current position of harmonisation in European criminal law? To answer that question, the text of the current EU Treaty can, of course, be consulted, but it is no simple matter to make statements on the basis of that text. On the one hand, Art. 31(1)(e) EU Treaty provides a relatively broad legal basis for the harmonisation of substantive criminal law. But this is not explained with a view to how that form of harmonisation can or must be brought about. On the other hand, Art. 31(1)(c) EU Treaty mentions 'ensuring compatibility of

5 Recognition of the support function of harmonisation is based on the idea that mutual recognition cannot count as a (full) alternative to harmonisation. See the classical essay by S. Peers, 'Mutual Recognition and Criminal Law in the European Union. Has the Council Got it Wrong?', *Common Market Law Review* (2004), pp. 5-36. See also P. Asp, 'Mutual Recognition and the Development of Criminal Law Cooperation within the EU', in E. Husabø and A. Strandbakken (eds), *Harmonization of Criminal Law in Europe* (Antwerp 2005), pp. 31-33.

2 Further reflections on the term harmonisation can be found for example in A. Klip and H. van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Amsterdam 2002). See also A. Klip, *European Criminal Law. An Integrative Approach* (Antwerp 2009), pp. 22-33.

3 For further elaboration, see A. Weyembergh, 'The Functions of Approximation of Penal Legislation within the European Union', *Maastricht Journal of European and Comparative Law* (2005a), pp. 155-170. See also W. Perron, 'Perspectives of the Harmonization of Criminal Law and Criminal Procedure in the European Union', in E. Husabø and A. Strandbakken (eds), *Harmonization of Criminal Law in Europe* (Antwerp 2005), pp. 17-19.

4 A side effect of this is that it prevents Member States from being bothered by acts not prohibited in another Member State. Think of the problems of drug tourism in the border regions of the Netherlands. See W. Perron, *op. cit.*, p. 17.

the rules applicable in the Member States, as may be necessary to improve such cooperation'. This expresses the support function of harmonisation, without making clear exactly which rules may be concerned. Does it pertain only to procedural law or to substantive criminal law as well? I will not deal further with Art. 31(1) EU Treaty. It is a well-known fact that Member States always broadly interpret the legal bases formulated there. This only makes it more difficult to say anything about the current position of harmonisation in European criminal law on the basis of Art. 31 EU Treaty.

### 3.2. *Tampere Conclusions and the Hague Programme*

More clarity can be obtained if attention is devoted to the main political policy programmes in the past decade: the Tampere Conclusions and the Hague Programme.<sup>6</sup> Both documents express in inspired words the ambitions being pursued in creating an area of freedom, security and justice. This is illustrated, for example by Milestone 5 of the Tampere Conclusions:

'The enjoyment of freedom requires a genuine area of justice, where people can approach courts and authorities in any Member State as easily as in their own. Criminals must find no ways of exploiting differences in the judicial systems of Member States. Judgements and decisions should be respected and enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of Member States must be achieved.'

It is not difficult to discern two ambitions relating to criminal law: mutual recognition of decisions in criminal matters and harmonisation of criminal legislation. But which function of harmonisation is central to this?

The Tampere Conclusions show that a clear field has been afforded for mutual recognition of judicial decisions. The designation of this principle as 'the cornerstone of judicial co-operation in ... criminal matters within the Union' is well known. In that section, which is devoted to mutual recognition, no mention is made of any form of harmonisation that would be necessary to put the principle of mutual recognition into operation.

One does not actually find an unambiguous view in the Tampere Conclusions of the function of harmonisation in the development of the area of freedom, security and justice. Attention is paid to aspects of harmonisation: (a) mention is made of setting minimum standards for the protection of victims of crimes with a view to access to the courts throughout Europe, (b) in relation to crime fighting,

a proposal is made to agree common definitions, penalisation and penalties in respect of several forms of crime, and (c) in connection with money laundering, it is briefly stated that the criminal law and procedures of the Member States on combating money laundering should be approximated. As these forms of harmonisation are not related to problems in cooperation between the Member States, it may be assumed that harmonisation here is viewed as an autonomous means to create an area of freedom, security and justice. The whole nevertheless produces a rather fragmented picture, because several sub-areas of criminal law in which harmonisation is supposed to take place are designated arbitrarily – at any rate without further explanation and substantiation.

The function of harmonisation is better and more consistently clarified in the Hague Programme. The section entitled 'Approximation of Law' allows no misunderstanding of the fact that harmonisation has a support function. Not only the establishment of minimum rules on aspects of procedural law – in particular procedural rights in criminal matters – but also the approximation of substantive criminal law is placed explicitly in the light of the principle of mutual recognition.<sup>7</sup>

### 3.3. *The Functions of Harmonisation in Framework Decisions*

The line of development that can be distinguished in the Tampere Conclusions and the Hague Programme – more emphasis on the support function of harmonisation, less attention for the autonomous function – also comes to the fore when one considers the series of Framework Decisions drafted since 2000. Initially, Framework Decisions were drafted mostly in relation to substantive criminal law, the preambles of which referred either only indirectly or not at all to the relationship to cooperation between the Member States in criminal matters. The need was rather put first and foremost in one way or another for a (more or less) uniform approach to certain types of crime as a means to create an area of freedom, security and legal certainty. This development continued until 2005. In the meantime, a stream of Framework Decisions are being drafted, specifically aimed at promoting effective and efficient cooperation between the Member States in criminal matters. They deal primarily with the development of the principle of mutual recognition in relation to different forms of cooperation. This seems to have reduced the need for harmonisation of criminal law. This is also evident from proposals for new Framework Decisions, which hardly relate to the harmonisation of substantive or procedural criminal law.

6 *Tampere European Council, 15-16 October 1999, Presidency Conclusions*, <[www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm)>; 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union', *Official Journal*, C 53, 3.3.2005, pp. 1-14.

7 Cf. A. Weyembergh, 'Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme', *Common Market Law Review* (2005b), p. 1584.

#### 4. Harmonisation in the Lisbon Treaty

What position does harmonisation take in the Lisbon Treaty? An important provision is Art. 82(1) of the Treaty on the Functioning of the European Union:

‘Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.’

It is evident from this provision that mutual recognition and harmonisation go hand in hand. Mutual recognition is the basis for judicial cooperation, but at the same time, that cooperation encompasses harmonisation of criminal laws and regulations.<sup>8</sup> Nevertheless, there is what one could call a difference in status between mutual recognition and harmonisation. Anyone who reads Art. 82(1) carefully will notice that ‘the principle of mutual recognition’ is mentioned unconditionally, whereas in relation to the ‘the approximation of the laws and regulations of the Member States’ reference is made to paragraph 2 of Art. 82 and to Art. 83. This expresses the clear field afforded for further development and application of the principle of mutual recognition. According to Art. 82(1), this has to do with the recognition of all forms of judgements and judicial decisions, while the necessary supporting measures – legal or practical in nature – can be taken, unlike harmonisation, which is subject to a number of preconditions.

In Art. 82(2), harmonisation of the law of criminal procedure is explicitly placed in the context of facilitating mutual recognition and cooperation in criminal matters having a cross-border dimension. In addition, account must be taken of the differences between the legal traditions and legal systems of the Member States. This concerns minimum harmonisation of several specifically indicated aspects of the law of criminal procedure, whereby such harmonisation has to explicitly fulfil a support function.

Regarding substantive criminal law, including sanction law, Art. 83(1) mentions harmonisation:

‘in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis’.

It also defines rather precisely which forms of crime are concerned.<sup>9</sup> In this way, room is made for harmonisation with an autonomous function, but at the

same time it is made clear that the playing field for that type of harmonisation is limited. Approximation of criminal law to create an area of freedom, security and justice does not encompass the whole of criminal law, but only those areas where Member States have a clear interest in acting on a common basis. For the rest, harmonisation can, of course, also take place on the basis of Art. 83(1) with a view to bringing about cooperation between the Member States, for example through common definitions of so-called listed offences – offences which are not reviewed for double punishability, in so far as those offences are on the list included in Art. 83(1).<sup>10</sup> But it is clear that Art. 83(1) is not limited to those offences.

Lastly, Art. 83(2) provides a legal basis for the harmonisation of substantive criminal law, in so far as this is essential for effective implementation of policy in the Union in an area which has been subject to harmonisation measures. This concerns harmonisation of criminal law with a view to the enforcement of other areas of European law. It is clear that the harmonisation that can take place on the basis of Art. 83(2) is not intended to facilitate cooperation between the Member States. In my opinion, this form of harmonisation can best be classified under the autonomous function of harmonisation, albeit in a weakened form.<sup>11</sup> Not the creation of an area of freedom, security and justice is put first and foremost, but the guarantee of a more or less uniform enforcement policy in sub-areas of European law. This concerns the final element in enforcement and not the harmonisation of characteristic and autonomous aspects of criminal law as such. Nevertheless, a (partial) harmonisation of criminal law does have the effect of bringing about a uniform enforcement policy.

#### 5. Concluding Remarks

What idea of the function and aims of harmonisation before and after the Lisbon Treaty arises now? It should be clear that the Lisbon Treaty continues a development that has already been in progress for some time. The support function of harmonisation has come more and more to the forefront, while the autonomous function has lost significance. This, of course, cannot be viewed apart from the tempestuous emergence and development of the principle of mutual recognition in criminal matters. This principle is embedded in the idea that differences between the criminal law systems of the Member States should not be an obstacle to effective and efficient cooperation between the Member States.

10 Another possibility is the mutual coordination of definitions of criminal acts with a view to defining the competences of institutions such as Europol and Eurojust, in so far as those acts fall within the scope of Art. 83(1).

11 Cf. A. Weyembergh (2005b), *op. cit.*, p. 1584.

8 Cf. C. Ladenburger, ‘Police and Criminal Law in the Treaty of Lisbon. A New Dimension for the Community Method’, *European Constitutional Law Review* (2008), p. 35; S. Peers, ‘EU Criminal Law and the Treaty of Lisbon’, *European Law Review* (2008), p. 511.

9 See also S. Peers, *op. cit.* (2008), p. 518.

Although the idea used to be that mutual recognition renders harmonisation completely or largely superfluous, one has now come to realise that a certain degree of harmonisation is indispensable for mutual recognition. This primarily concerns minimum harmonisation of the law of criminal procedure.

The autonomous function of harmonisation is expressed much less clearly in the Lisbon Treaty. The Union chooses to use the harmonisation of criminal law with restraint outside the context of cooperation between the Member States in criminal matters. I predict that regulations will be adopted in this area especially to allow criminal law to function as the final element in enforcement. This is, of course, not without significance, but it will mainly be a development with consequences for economic criminal law and to a much lesser extent for criminal law in a broad sense.

In short: after Lisbon, European criminal law will mainly relate to effective and efficient cooperation. Harmonisation is first and foremost an important means to enable cooperation, because a certain degree of equality between the criminal law systems of the Member States helps to create mutual trust. Harmonisation outside the context of facilitating such cooperation will not take place any time soon. The Lisbon Treaty thus shows that the ambitions to unify the criminal law systems of the Member States have been moderated and that the Member States have been left ample room to give their own substance to criminal law.

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